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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1001

NATIONAL STARCH PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST), *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

On January 5, 1960, Petitioner, National Starch Products, Inc., filed a protest with the Collector of Customs at New York, protesting the Collector's classification of particle board in 4′ x 8′ sizes under Paragraph 1402 of the Tariff Act of 1930 (49 U.S.C. § 1001, Para. 1402 (1958)), alleging instead that such merchandise was properly classifiable under Paragraph 1539(b), as a "manufacture wholly or in chief value of any product of which a synthetic resin or resin-

like substance is the chief binding agent". (R. 1, pp. 5-11). On May 17, 1960, a trial was held and on May 18, 1961, the Customs Court filed an opinion sustaining the protest and holding that particle board in 4' x 8' sizes was properly classifiable under Paragraph 1539(b). (R. 1, pp. 77-90.)

On July 15, 1961, the Party-in-Interest, Index Industrial Corp., filed a petition for review claiming, *inter alia*, that the lower court erred in holding that particle board is classifiable under Paragraph 1539(b). (R. 1, pp. 1, 2) Oral argument was held in the Court of Customs and Patent Appeals on February 9, 1962, and on May 18, 1962, that Court affirmed the Customs Court decision. (R. 11.)

On July 6, 1962, the Party-in-Interest filed a Petition for Rehearing in which it alleged that the Court of Customs and Patent Appeals decision affirming the judgment of the Customs Court was in conflict with a long line of Supreme Court and Court of Customs and Patent Appeals decisions. (R. 12, pp. 1-12.) On December 12, 1962, the Court of Customs and Patent Appeals withdrew its earlier opinion and issued a new one holding, *inter alia*, that particle board is not properly classifiable under Paragraph 1539(b), and since Petitioner had the burden of proving that it is, the judgment of the Customs Court sustaining the Protest was reversed. (R. 28.)

ARGUMENT

Petitioner has noted two grounds upon which it believes that certiorari should be granted. The first relates to the burden of proof required of a plaintiff in a domestic manufacturer's protest action against the collector of customs. The second relates to the ques-

tion of whether that burden was sustained by the plaintiff in this case. It will be shown below that the first point is not only clearly covered by the applicable statute, but also is well settled by prior decisions of this Court which were followed by the Court below. The second point, in addition to having been properly decided by the Court below, is of no conceivable public importance. Accordingly, neither point is a proper ground for granting certiorari.

The Dual Burden of Proof

The first point raised by Petitioner is that the lower court erred when it required a so-called "dual burden of proof" in a suit arising from a protest filed by a domestic manufacturer pursuant to 19 U.S.C. § 1516 (b) (1958).

In order to discuss this point, it is first necessary to determine what is meant by the term "dual burden of proof". Technically, of course, it is the requirement in customs law that one who protests against a classification[1] assigned by a collector of customs, is required to show (1) that the collector's classification is errone-

[1] The amount of customs duty on any product is determined in a two-step process. First, the Appraiser determines the value of the goods (Appraisal) (See, 19 U.S.C. § 1500 (1958)) and second, the Collector determines under which paragraph of the Tariff Act they should be entered (Classification) (See, 19 U.S.C. § 1505 (1958)). The exact amount of duty is then computed (in cases where an ad valorem duty has been imposed) by multiplying the statutory rate for the classification selected by the collector by the value determined by the appraiser. An imposition of duty can be challenged on either ground. (19 U.S.C. §§ 1514, 1516 (1958).) In this case it was challenged by an American manufacturer on the ground that the Collector had classified the importation under Paragraph 1402 as "wallboard", when it should have been classified under Paragraph 1539(b) as a manufacture of a product the chief binding agent of which is synthetic resin.

ous, and (2) that the classification urged by the protestant is correct.[2] In a broader sense, however, it is merely the requirement that a protesting party in a customs case, like the plaintiff in any other suit, show that he has sustained injury.[3] In the case of an American manufacturer's protest, injury can only be shown by proving that the amount of duty exacted by the collector was *too low.* "Too low" being a relative term, it is, of course, necessary to show that a different, and higher, rate ought properly to have been applied. Accordingly, it is said that a protesting party must show not only that the classification of the collector is wrong, but also that the classification urged by the protestant is correct. This then is the "dual burden of proof" of which Petitioner complains.

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[2] See, e.g., Davies v. Arthur, 96 U.S. 148 (1878); Arthur v. Unkart, 96 U.S. 118 (1878).

[3] In Stark v. Wickard, 321 U.S. 288, 304 (1944), this Court expressed the same thought as follows:

> It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

Cf., Massachusetts v. Mellon, 262 U.S. 447 (1923).

It appears that if 19 U.S.C. § 1516(b) (1958) were construed as Petitioner suggests that it should be, i.e., so as to allow domestic manufacturers to bring actions to test a collector's classification without showing injury, there would be considerable question about the statute's constitutionality, since no "case or controversy" would be involved. See, 3 Davis, Administrative Law, § 22.05 (1958). In any event, the court need not reach this issue since it is clear that the statute does not allow Petitioner to proceed without showing injury. Therefore, the "case or controversy" question does not arise.

In the case at bar Petitioner protested the Collector's classification of particle board under Paragraph 1402 as being too low, claiming that it was properly dutiable at a much higher rate under Paragraph 1539(b). The Court of Customs and Patent Appeals held that since Petitioner had not shown that the merchandise was properly dutiable under Paragraph 1539(b), it was not necessary to reach the question of whether the Collector's classification was in error. Petitioner now asks certiorari on the theory that it did not have the burden of proving that Paragraph 1539(b) was the proper classification.

Petitioner concedes that the "dual burden of proof", or injury concept, has always properly been applied to importer's suits, but argues (1) that the requirement is not applicable to protests by domestic manufacturers, and (2) that the Supreme Court has never passed on this point. It is clear, however, from the applicable statute and the decisions of this Court that the decision of the Court below was not only clearly correct, but was required by a long line of Supreme Court decisions.

The statute authorizing customs protests by domestic manufacturers[4] requires by necessary inference that a protesting domestic manufacturer both plead and prove the proper rate. This statute provides a three-step procedure. First, the domestic manufacturer must file a complaint with the Secretary of the Treasury; second, he must file a protest with the Collector of Customs; and third, the case is heard by the Customs Court. At each step the plaintiff must allege

[4] 19 U.S.C. § 1516 (1958).

the classification he believes is proper. Thus, the statute provides for the complaint as follows:

> "If such manufacturer . . . believes that the proper rate of duty is not being assessed, *he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief.*" (Emphasis added.)[5]

Later, the statute provides for a protest to be filed as follows:

> "Within thirty days . . . the complainant may file . . . a protest in writing *setting forth a description of the merchandise and the classification and rate of duty he believes proper.*" (Emphasis added.)[6]

Still later, provision is made for settlement of the dispute in the Customs Court.

> "The collector shall transmit the entry and all papers and exhibits accompanying or connected therewith to the United States Customs Court *for due assignment and determination of the proper value or the proper classification and rate of duty.*" (Emphasis added.)[7]

Thus, not only must the proper rate and classification be alleged in all the plaintiff's pleadings, but also the whole purpose of the procedure is to determine what the proper rate is. Certainly, one who is required to allege the proper rate in his pleadings is required to prove it as well, for otherwise there would be no point

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[5] Id. § 1516(b).

[6] Ibid.

[7] Id. § 1516(c).

in alleging it in the first instance. If seems, therefore, that Petitioner's first contention, i.e., that the plaintiff in such an action does not have the burden of proving the proper rate and classification, is not supported by the statute. On the contrary, the statute appears to compel the opposite conclusion.

Petitioner also contends that the Supreme Court has never decided this issue, but this contention is equally without merit. This court has many times held the dual burden requirement applicable to importer's protest suits, and the purposes for applying it are equally as applicable in a suit by a domestic manufacturer.[8] This Court has repeatedly held that the reason that an importer is required to both allege and prove the proper rate (in spite of the fact that it is not literally required by the statute),[9] is to apprise the collector of the objections entertained by the importer, before it is too late to remove them, and to hold the importer to the objections which he then contemplated and on which he really acted.[10] Thus, the reasons for impos-

[8] Moreover, many of the decisions of this court requiring a dual burden of proof in importers' protest actions were rendered during the 1864-1912 period when the protests of importers and domestic manufacturers were brought under the same statute. See note 10, infra.

[9] The importer's protest is authorized by 19 U.S.C. § 1514 (1958) which provides in pertinent part that the importer must "file a protest in writing with the collector setting forth distinctly and specifically . . . the reasons for the objection . . ." to the collector's decision. This language has been held to require that the proper rate be alleged in the protest, and the importer has been held to the claims made in the protest. Davies v. Arthur, 96 U.S. 148 (1878).

[10] Herrman v. Robertson, 152 U.S. 521 (1894); Davies v. Arthur, 96 U.S. 148 (1878). See also, Arthur v. Dodge, 101 U.S. 34 (1880); Heinze v. Miller, 144 U.S. 28 (1892); United States v. Salambier, 170 U.S. 621 (1898).

ing a dual burden were completely unrelated to whether the plaintiff was an importer or a domestic manufacturer. Is it any less necessary that the Collector be given an opportunity to change his practice when the protesting party is a domestic manufacturer instead of an importer? Is it any less necessary that the protestant be held to those objections which he contemplated at the time of his protest when he is a domestic manufacturer instead of an importer? If any reasons for such discrimination exist they are not suggested by the statute, by existing court decisions, or by the Petition in this case. On the contrary, the only material difference between the two suits appears to be that in one the importer is asking for a lower rate and in the other the domestic manufacturer is asking for a higher rate. Otherwise the actions are the same,[11] and the Court below properly applied the same burden of proof.

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[11] In fact, the domestic manufacturer's protest appears to have grown out of the importer's protest. Originally, importers brought actions in assumpsit against the collector for money had and received on the theory that the collector had exacted excessive duties from them. (See the discussion in Elliot v. Swartwout, 35 U.S. (10 Pet.) 137 (1836).) Later, for reasons unconnected with the substance of the action (See, Carry v. Curtis, 44 U.S. (3 How.) 236 (1845); Fiedler v. Curtis, 67 U.S. (2 Black) 461 (1863), it was provided for by statute. (Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.) Later still, the wording of the act was changed such that an importer who was "dissatisfied" with a decision of the collector could protest it (Tariff Act of 1864, ch. 171, § 14, 13 Stat. 202), and the domestic producer's action was first brought under this language. The domestic producer imported a token shipment of his foreign competitor's product, thereby becoming an "importer", and then protested the assessment of duties thereon, announcing that he was "dissatisfied", not because the duty was too high, but rather because it was too low. See the discussion of this problem in United States v. Schwartz & Co., 3 Ct. Cust. App. 24 (1912). Thus, at this point, the protests of the importer and the domestic

Was the Burden of Proof Sustained?

The second point raised by Petitioner appears to be that, assuming that the dual burden is applicable to actions by domestic manufacturers, then certiorari should be granted because the Court of Customs and Patent Appeals erred in holding that Petitioner had not sustained its burden of proof.

There are at least four reasons why certiorari should not be granted on this issue. First, the Court below correctly decided this issue, and Petitioner's argument to the contrary is based upon Respondent's alleged failure to argue issues which were not before the Court[12] and concessions which were not made.[13] Second,

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manufacturer were both authorized by the same statute, and decisions of this court such as Herrman v. Robertson, 152 U.S. 521 (1894), requiring a dual burden of proof applied equally to both. In 1913, however, the language of the act was changed such that only protests alleging duties were too high were allowed. (Tariff Act of 1913, ch. 16, § 3, 38 Stat. 114.) In 1922 a new section was added specifically providing for protests to be filed by domestic manufacturers. (Tariff Act of 1922, ch. 356, § 516(b), 42 Stat. 858.) The stated purpose of the new section was to restore the "right of protest against the rate or amount of duty as being too low" which was in the law prior to 1913. H.R. Rep. No. 248, 62d Cong., 1st Sess. 25 (1922). The language of this section has remained substantially the same to the present day. 19 U.S.C. § 1516(b) (1958).

[12] Petitioner states: "Respondent did not challenge the correctness of the collector's general classification of particle board under 1539(b), . . ." Petition, p. 13. This is true. The issue before the Court was the proper classification of particle board in 4 x 8 sizes. Respondent could only deal with that issue. Accordingly, Respondent, even if it had wanted to, could not have "challenged the collector's general classification of particle board."

[13] Petitioner states: "Respondent . . . conceded that the merchandise in question was particle board of the type which the collector [classified under Paragraph 1539(b)] . . ." Petition, p. 13. As authority for this proposition Petitioner cites "R. 1—p. 76; Appendix B hereto, *infra*, pp. xxxi-xxxii." The pages cited do not contain the concession described by Petitioner, nor as far as Respondent can determine, does the rest of the Record.

even if the Court below had erred, certiorari should not be granted merely for the purpose of making the largely factual inquiry of whether or not one of the parties has sustained its burden of proof. Third, to the extent that construction of a statute is involved, it relates to an issue having application only to an obscure section of the Tariff Act of 1930. (19 U.S.C. § 1001, Para. 1539(b) (1958)). Fourth, the paragraph of the Tariff Act of 1930, the construction of which is requested, together with the rest of Titles I and II of the Tariff Act of 1930, has already been superseded[14] and will probably become inoperative before this case could be decided by this court. Since the new Act which will replace the Tariff Act of 1930 contains a specific provision for particle board,[15] any decision on this issue by this court could apply only to this case. Accordingly, under the principles enunciated in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954) and *District of Columbia* v. *Sweeney*, 310

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[14] The Tariff Classification Act of 1962 (Pub. L. 87-456, 87th Cong., 76 Stat. 72, May 24, 1962), provides in part as follows:

> "Sec. 101. (a) The Tariff Act of 1930, as amended, is amended by striking out titles I and II (19 U.S.C. 1001 and 1201) and . . . by substituting in lieu thereof a new title I entitled 'Title I—Tariff Schedules of the United States'."

The new Title I is made up of the headnotes, appendix and schedules one to eight of the Tariff Commission publication entitled "Tariff Classification Study, Proposed Revised Tariff Schedules of the United States" and its supplements. The new Title I contains a specific designation for wood particle board (Schedule 2, Item 245.50), and, therefore, the question of whether the "wallboard" classification of particle board is, or is not, an exception to a general classification of all particle board under Paragraph 1539(b) will not be involved in the new Title.

[15] See note 14, *supra*.

U.S. 631 (1940), certiorari should be denied because the question is not of public importance.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

INDEX INDUSTRIAL CORPORATION,
PARTY IN INTEREST

Respondent

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By: BRUCE E. CLUBB

Dated:
Washington, D. C., April 26, 1963

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by causing a copy thereof to be mailed via first-class mail, postage prepaid, properly addressed to each such party, as listed below:

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